

JUDGES CAN FIX *the* SYSTEM

→ *here's how*

BY ED SPILLANE

MELISSA J. SHOWED UP IN MY COURT LAST YEAR WITH FOUR KIDS IN TOW. Her children quietly watched from a nearby table while I spoke with her. The charges against her — driving with an invalid license, driving without insurance, not wearing a seat belt, failure to use a child safety seat properly and four failures to appear — were nothing unusual for municipal court. Nor were her fines of several thousand dollars. But for Melissa, who had a low-paying job and a husband in prison, and who looked like she hadn't slept in days, that number might as well have been several million.

As a municipal judge in College Station, Tex., I see 10 to 12 defendants each day who were arrested on fine-only charges: things like public intoxication, shoplifting, disorderly conduct and traffic offenses. Many of these people, like Melissa, have no money to pay their fines, let alone hire a lawyer.

What to do with these cases? In *Tate v. Short*, a 1971 Supreme Court decision, the justices held that jail time is not a proper punishment for fine-only criminal cases,

citing the equal protection clause of the 14th Amendment. But in many jurisdictions, municipal judges — whether they're overworked, under pressure to generate revenue through fees, skeptical of defendants' claims to poverty or simply ignorant of the law — are not following the rules. As a result, far too many indigent defendants are simply cited for contempt of court and land behind bars for inability to pay.

There's another way, and I've been experimenting with it in my own courtroom.

There are no firm numbers nationally on how many fine-only cases end with the defendants in jail, but figures from particular jurisdictions around the country are grim, if partial. A 2014 survey by NPR, New York University's Brennan Center for Justice and the National Center for State Courts showed that in Benton County, Wash., a quarter of people in jail for misdemeanors on a typical day were there for nonpayment of fines and court fees. The study also found that civil and criminal fees and fines had increased in 48 states since 2010. (Joseph Shapiro, *As Court Fees Rise, the Poor are Paying the Price*, NPR, May 14, 2014.)

The percentage of jail bookings in Tulsa involving inmates who had failed to pay court fines and fees more than tripled, to 8 to 29 percent of 1,200 inmates, between 2004 and 2013, according to reporting by the Tulsa World. (Casey Smith and Cary Aspinwall, *Increasing number going to jail for not paying fines*, Tulsa World, Nov. 3, 2013.) Eighteen percent of all defendants sent to jail in Rhode Island between 2005 and 2007 were incarcerated because of court debt; in 2005 and 2006, that amounted to 24 people per day. (Rhode Island Family Life Center, *Court Debt and Related Incarceration in Rhode Island from 2005 through 2007*, <https://csgjusticecenter.org/wp-content/uploads/2008/04/2008-RI-CourtDebt.pdf>.)

Enough people in Ohio were being locked up for failure to pay fines that, in 2014, the state's chief justice issued a warning to all judges to stop jailing indigent defendants. In March, the U.S. Justice Department released a letter stressing that courts should not incarcerate defendants for nonpayment and that alternatives must be considered.

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"In addition to being unlawful," the letter read, the practice "can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents."

The individual cases are startling. A 19-year-old unemployed Michigan man was jailed after failing to pay a \$155 fine for catching a fish out of season; he came up with the \$175 bondsman fee to get out but then couldn't pay the original fine, so he went back to jail. In Ferguson, Mo., one woman was arrested and jailed multiple times over two parking tickets from a single violation in 2007. More than seven years later, she had paid \$550 in fines and fees and still owed the city \$541, even though her original fine was just \$151 plus fees. Her case isn't particularly unusual for Ferguson: The Justice Department report on the city's municipal court system revealed "overwhelming evidence" that indigent defendants were serving jail time on fine-only charges, often for traffic offenses.

Fortunately, courts and judges are not powerless to fix the system.

First, defendants must be allowed to argue economic hardship in an indigency hearing, which is Constitutionally required if a defendant says he or she can't pay. It's unclear how many judges skip these hearings, and practices vary from one jurisdiction to another, but Lauren-Brooke Eisen, senior counsel at the Brennan Center, says there's no question that some judges aren't holding them. "Sometimes it's not always nefarious," Eisen says. "They have very full dockets. . . . It can require overtime just to finish their docket for the day. It's not always a deliberate decision to not hold those hearings."

A BuzzFeed investigation in several Texas cities last year found judges who disputed the requirement to hold indigency hearings, in direct contradiction of state law; some judges claimed not to have the resources to hold them or said defendants wanted to do jail time. Obviously none of these answers satisfies the law. (Kendall Taggart and Alex Campbell, *Their Crime: Being Poor. Their Punishment: Jail*, BuzzFeed, Oct. 7, 2015.)

Once a defendant proves indigency, we can also be much more creative in our sentencing than "fine or jail" (or a suspended driver's license, a popular measure that disproportionately hurts low-income workers who can't get to their jobs without driving). Community service at a nonprofit or government entity is one of the strongest tools judges have at their disposal; in my experience, it boosts defendants' self-esteem and provides valuable assistance to nonprofits. In my first week as a municipal court judge, in 2002, I visited the jail and, as part of the arraignment process, met with a 27-year-old unemployed woman named Amy V., who had pleaded guilty to driving without insurance, driving with a suspended license and two failure-to-appear charges. She stood up, looked me in the eye and informed me that she would never pay her \$1,500 fines. (She also suggested that I was interested in the money only so I could buy myself a steak dinner.) She insisted that she wanted to stay in jail. I released her with an order to complete 70 hours of community service over several months. ▶

I ran into Amy several years later; she now owns a hairstyling business.

Community service isn't always an option. Melissa J. not only couldn't pay her fines, but she also couldn't be away from her children at night or on weekends, since she couldn't afford child care. So we set her up on a small payment plan, an arrangement that sometimes works for poor defendants. When it later became apparent that she could not afford that, we waived the fine — but only after she took a free class on the use of child safety seats, addressing what was arguably the most concerning charge against her. Our police department, which had cited Melissa originally, was happy to show her how to use a child car seat properly. (In general, the feedback I've gotten from the College Station police on alternative sentencing has been positive; they don't want to see defendants reoffend, either.) She obtained a valid driver's license and has not been to our court since.

Judges can also sentence defendants to anger-management training, classes for first-time offenders or drunk-driving-impact panels. National research shows that alternative sentencing like teen courts can reduce recidivism, and my experience confirms this. One defendant in an alcohol-related case, Jeff Schiefelbein, was sent to a Mothers Against Drunk Driving victim-impact panel in 1997. He was so moved by the experience that he decided to create a designated-driver program for anyone who is intoxicated and needs a ride home. Since 1999, his organization, Carpool, has provided on average 650 rides each weekend in College Station.

And occasionally, as a judge, you can choose mercy. Roger S. was facing an \$800 fine for speeding, driving without insurance or registration, and driving with defective equipment. He also had terminal cancer. He wrote to me, explaining that he could not afford his treatments, much less what he owed the court. I picked up the phone and called him from court. He was a little surprised but pleased to be talking to the judge. After discussing his medical treatment and all of those costs in detail, I waived his fines because of indigency and inability to perform community service, much to his and his family's relief.

COURTS MUST BE AS ACCESSIBLE AS POSSIBLE, AND THAT STARTS WITH ALLOWING CHILDREN TO ACCOMPANY THEIR PARENTS. ONE OF THE REVELATIONS IN THE JUSTICE DEPARTMENT'S REPORT ON FERGUSON WAS THAT CHILDREN WEREN'T ALLOWED IN MUNICIPAL COURT, WHICH EXPLAINS WHY MANY DEFENDANTS WERE UNABLE TO APPEAR.

Lauren-Brooke Eisen of the Brennan Center suggests that judges are continuing to sentence such defendants to jail instead of pursuing alternatives partly because of the wording in another Supreme Court ruling, *Bearden v. Georgia*. "Judges cannot revoke someone unless it's for willful nonpayment," she says. "As you can imagine, the word 'willful' can be interpreted in many different ways. . . . Sometimes a judge will have a hearing and will say, 'It looks like you're paying for XYZ' or 'You have a job.'"

Judges might also be unlikely to dismiss fees because municipalities have become so dependent on the revenue — as in Washington state, where interest rates on unpaid fees are 12 percent, or in Ferguson, where revenue from court fees increased 80 percent in two years. (Mike Maciag, *Skyrocketing Court Fines*

are Major Revenue Generator for Ferguson, Governing, Aug. 22, 2014.) Courts "are not an ATM for the city council," says Ohio Chief Justice Maureen O'Connor, who co-chairs a national task force on fines, fees and bail. "You're not supposed to be funding your operation from fines or fees." But, she says, "judges want to have decent facilities. They want to have support staff. It may very well be that local funding sources . . . have said, 'You've got to pay for your own keep.' That's not the way it should be."

The judges I've spoken with who jail these defendants fall into several categories. Some simply do not understand the requirement to hold indigency hearings. One judge told BuzzFeed that in nine years on the bench, she'd never given a defendant an alternative to jail, and she insisted that she was not required to offer one. But O'Connor says there's "no excuse" for judges to be ignorant of the law, thanks to the training and continuing educational opportunities available to them. "If they don't know, then they weren't listening."

Others know the law but agree to jail defendants who say they'd prefer it to community service, which is still not allowed under law. And some look upon granting alternative sentences and waiving fines as a slippery slope to not taking crime seriously. My experience with defendants has been exactly the opposite.

Of course, no matter how many great alternatives judges can provide instead of jail time, if a defendant fails to come to court, he or she won't be able to hear about them. Courts must be as accessible as possible, and that starts with allowing children to accompany their parents. One of the revelations in the Justice Department's report on Ferguson was that children weren't allowed in municipal court, which explains why many defendants were unable to appear. Several courts in Texas limit or don't allow parents to bring their children, even though, in my experience, kids in court don't present a problem — maybe because we provide coloring books and toys for them to play with while their parents take care of their cases.

Twice a year, Brazos County also provides two to three weeks of warrant amnesty, when we waive the \$50 warrant

fee for any active warrant if the defendant comes to court to take care of his or her case. The court communicates with defendants through letters, phone calls and emails so they know their options; I ask undergraduate interns to volunteer to call people in active warrant. It's amazing how many defendants show up once they know they won't be immediately arrested when they step into the courtroom — we clear about 600 cases during each amnesty period. The program, which has been in place for 15 years, has caught the eye of Doug Colbert, a University of Maryland law professor, whose goal is to bring a similar warrant amnesty program to Baltimore.

I used to prosecute felonies as an assistant district attorney in Brazos County. During that time, I worked for a year in the intake division. This drove home a

lesson that my boss, the district attorney, had been trying to instill in me: Every case file is an individual whose rights are as important and sacred as mine or those of my family. The decision to charge or dismiss demands empathy and vigilance. Misdemeanor criminal cases provide an opportunity for a much happier outcome than most felonies because there is a genuine chance for a defendant to learn from a mistake and never set foot in a courtroom again — and keeping someone out of jail is a good way to ensure that happens. In these cases, it should be possible for defendants to resolve their cases without losing their liberty.

All judges want to uphold the rule of law in the communities we serve, but too often we can get lost in the day-to-day business of running a court; we ignore the

consequences of what we do. An arrest can cost a citizen his or her job, dignity and security. Alternative sentencing is a way to achieve what we should all want: an end to criminal behavior.



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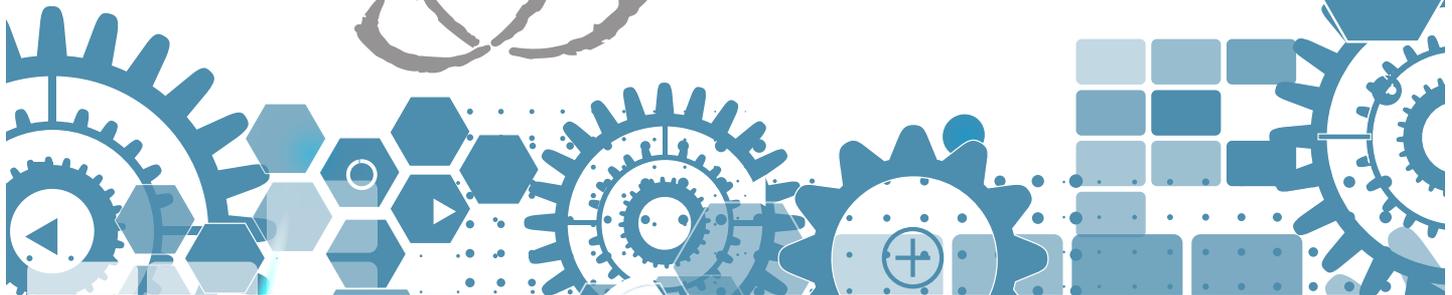
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